IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

HAFF POULTRY, INC., JOHNNY UPCHURCH, JOHNATHAN WALTERS, MYLES B. WEAVER, MELISSA WEAVER and NANCY BUTLER,	)	
Plaintiffs,	)	
vs.	)	No. CIV-17-33-RJS
TYSON FOODS, INC., TYSON CHICKEN, INC., TYSON BREEDERS, INC., TYSON POULTRY, INC.,PILGRIM PRIDE CORPORATION and PERDUE FARMS,INC.,	)	
Defendants.	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT JUDGE

JANUARY 6, 2020

* * * * *

REPORTED BY: KEN SIDWELL, CSR-RPR
United States Court Reporter
P.O. Box 607
Muskogee, Oklahoma 74402

APPEARANCES

FOR THE PLAINTIFFS:

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FOR THE DEFENDANTS:

MS. RACHEL J. ADCOX, Axinn Veltrop & Harkrider, LLP, 950 F Street, NW, Washington, D.C. 20004, for Tyson,

MR. CLAYTON E. BAILEY, Bailey, Brauer, PLLC, 8350 North Central Expressway, Suite 206, Dallas, Texas, 75206, for Pilgrim Pride,

MS. PATRICIA A. SAWYER, Whitten Burrage, 512 North Broadway, Suite 300, Oklahoma City, Oklahoma, 73102, for Tyson,

MR. LEONARD L. GORDON, Venable, LLP, 1270 Avenue of the Americas, 24th Floor, New York, New York, 10020, for Perdue.

JANUARY 6, 2020 PROCEEDINGS

(On the record at 9:48 a.m.)

THE COURT: Are there fewer of you than there were last time? Are some of you dying in the interim? Good morning. We'll go on the record in our consolidated case, Number 6:17-CV-33. Counsel, you are familiar to me, though it's been a while since I've had the pleasure of seeing your faces and I have your names here, but take a moment, would you, please, and make your appearances.

MR. CRAMER: Good morning, Your Honor. Eric Cramer from Berger & Montague for the plaintiffs. And we also have in the audience Stephen Haff from Haff Poultry.

THE COURT: Great. Thank you.

MR. CRAMER: Thank you, Your Honor.

MR. SMITH: Good morning, Your Honor. Gary Smith from Hausfeld on behalf of the plaintiff.

THE COURT: Welcome.

MR. WALKER: Good morning, Your Honor. Dan Walker from Berger & Montague on behalf of the plaintiffs.

THE COURT: Thank you.

MR. MASON: And good morning, Your Honor. Gary Mason with Whitfield Bryson & Mason.

THE COURT: Terrific.

MS. ADCOX: Good morning, Your Honor. Rachel Adcox from Axinn Veltrop & Harkrider on behalf of Tyson

Foods.

THE COURT: Thank you.

MR. GORDON: Good morning, Your Honor. Leonard Gordon from Venable Firm on behalf of Perdue.

MS. SAWYER: Good morning. Patricia Sawyer, Whitten Burrage on behalf of Tyson Foods.

THE COURT: Thank you.

MR. BAILEY: Good morning, Your Honor. Clayton Bailey from Bailey Brauer in Dallas on behalf of Pilgrims Pride.

THE COURT: Good morning. Sorry to keep you all for a few minutes this morning. We were having an IT issue.

So as we discussed during our telephonic status conference in November what I anticipate accomplishing today is providing you with rulings on the outstanding motions, and then I think we have some case management work to do. And I'll be asking all of you for some guidance and feedback when we get to that point.

You'll want to take a moment before we begin and look at your workspace and make sure there's nothing sharp lest one of your colleagues be reaching for something sharp to stab yourself while I give this oral ruling because it is long. So if you have other work that you need to do or whatever, take a nap, if you'd just keep your snoring down a little bit, please, so the court reporter can hear.

We've attempted to be thorough and complete in the rulings that we'll provide today. And the upside of that is that you'll have the benefit, I hope, of a relatively complete record in the event that you need it for some reason. The downside is you'll just have to bear with us. There'll be a long time before any of you speak again.

The punch line is that I'm denying the defendants' joint motion to dismiss under Rules 12(b)(2), 12(b)(3) and 12(b)(6). That joint motion is Docket 193. And then I'm also denying Perdue's motion to compel arbitration with Plaintiff Butler. That's Docket 192.

I have in my mind that we have some work that we need to do with the complaint to ensure our compliance with the bankruptcy court order respecting Pilgrims Pride was it? Right.

One of the things that I'll be asking counsel for the plaintiffs after we complete giving the ruling is anticipating a likelihood that there will be a second amended complaint to deal with the bankruptcy issues. There isn't a motion pending for leave to file a further amended complaint, and I think we ought to talk about what it is that the plaintiffs would anticipate, or wish to achieve through an amendment and the scope of that amendment, or whether it's something that you all need time to consult with your clients and then perhaps file a motion describing

in greater detail. The nuance or the complexity I see to that is that my hope and desire, given the time that has elapsed, is that we leave here today with sort of a time line for moving forward and some clear guidance about how and when the next steps will be achieved so that we can get the train moving again.

I think, in the interest of completeness, it may be helpful for us to begin by reminding ourselves where we've been, and so I'll take a moment at the outset here and provide I think a summary of our procedural history, and then we'll move into the motions. And we'll take them up in turn. First, the motion to dismiss and then the arbitration motion.

So in January of 2018, we were together here and received argument on, and the Court issued a ruling effectively granting the motion or motions of the Koch parties and Sanderson defendants' motion to dismiss for personal jurisdiction and improper venue. And then when last we were together, we received argument on the two motions that the Court will be addressing today. The transcript of that hearing is our Docket Number 229. That hearing was in April, April 26 of 2018. And I think prompted in part by some of the argument that we had during that hearing, the defendant sought and received leave to file supplemental briefing concerning allegations of a

relevant market, and the defendants filed that supplemental briefing in May of 2018. That's Docket 234. That prompted the plaintiffs to respond in June of 2018, Docket 239.

The Court then received additional briefing, further briefing both in June and in July. First, the defendants, through a motion, provided supplemental authority, Docket 242. And the plaintiffs responded in turn with -- well, responded to that supplemental authority in a response that's Docket 243. And I'm going to take a short detour here and discuss briefly the supplemental authority, again in the interest of a complete and thorough record.

So I'll just be to the point here. The supplemental authority submitted by the parties plays no role in the Court's analysis today, other than, in some instances, citations to some of the new cases for basic Sherman Act principles. And the reason that the supplemental authority is not significantly affecting the Court's ruling is that, well, really, the reasons set forth in the plaintiffs' response to that authority.

Briefly, the defendants submitted to the Court the Supreme Court decision of *Ohio vs. American Express Company*, a 2018 decision in which the Supreme Court found vertical antisteering agreements in American Express's contracts with its merchants not to be Sherman Act violations under the rule of reason. The defendants contend

that that case is important here because, they argue, the court clarified that a Sherman Act plaintiff must show a relevant market when the alleged restraints at issue are vertical.

In vertical cases we need a showing of a relevant market because the entity imposing restraints must have market power. Defendants analogized the American Express merchant relationship there to the relationship here among the poultry integrator companies and their relationship to Agri-Stats and, for that reason, they characterize the plaintiffs' claims in this case as being vertical in nature. But in my judgment, accepting that characterization ignores how the plaintiffs themselves have chosen to plead their claim and how it has been alleged to operate in the consolidated amended complaint, including the horizontal nature of the reciprocity between the integrators, which is merely facilitated by Agri-Stats and is the real target of the plaintiffs' claims.

Agri-Stats, as we'll discuss at great length today, takes the information from the integrators and then shares it with the horizontal actors who further use it for their own benefit. The conduct the plaintiffs challenge is not vertical, and does not involve a vertical restraint in the defendants' relationship with Agri-Stats. And so I wholly agree, at this stage at least, with the reasoning in

the plaintiffs' response to the authority, Docket 243.

And let me say, I just commented on some of the allegations. And I'll be referring today to facts extensively in our discussion. And just by way of background and a reminder, we're here at Rule 12. So the facts that I'm relying on are largely drawn, but not exclusively drawn here from the amended consolidated complaint. And those facts in that complaint of course are presumed to be true, though while pleaded allegations in that complaint, presumed to be true.

I think it is appropriate, given the nature of the claims, for the defendants to have provided additional factual information, and I've considered that at times as it's appropriate. And I failed to mention this at the beginning because I haven't yet started into the discussion about the motions on their merits. But you don't need to -- you can set down your pens. Take whatever notes you want. But I'm not going to be asking any of you to prepare a ruling to submit an order for the Court's review. Instead, we'll be placing on the docket in the next few days an entry referring to the transcript of this hearing and this portion of the hearing as the Court's ruling and the basis for the Court's ruling. So you don't need to worry about cramps in your hands.

All right. Returning to our procedural

history. In the first quarter of 2019, the plaintiff -- or, excuse me -- the plaintiffs, yes, corresponded with the Court specifically concerning Pilgrims Pride, and the plaintiffs requested a hearing to take up those issues. That was Docket 250. Pilgrims Pride responded and questioned whether a hearing was necessary. And then, as I said, in November when we spoke, I was slow to get a status conference set in November. And my apologies again to all of you and your clients for that delay. And while I can't -- I can't go back and make up for that time, I can assure you and I do assure you that you have my undivided attention, and you will moving forward. We'll be fully engaged to ensure that there are not any additional unnecessary delays.

In any event, in the weeks leading up to the status conference that we had in November, the plaintiffs filed a motion to lift discovery -- or, excuse me -- the discovery stay in this case. That submission was Docket 253. And of course, the defendants opposed that motion in Docket 261.

During that November status conference, we discussed the Pilgrims Pride issues, the need for this hearing to provide an oral ruling rather than having additional delay for the benefit of a written decision. And during that hearing, I denied without prejudice the

plaintiffs' motion to lift the discovery stay.

So we'll proceed now, as I said, with oral rulings on the outstanding motion to dismiss and the arbitration, and then we'll take up some housekeeping matters.

Throughout the hearing and throughout this ruling, I will at times refer to page numbers in some of the filings, especially with respect to the briefings. And just so it's clear, I'll be referring to the pagination that the court's docketing system places on the papers at the top of the page, which does not usually align with the pagination that the parties use when you prepare the documents initially.

So we'll turn now to defendants' joint motion to dismiss. And let me just say, because at some point you'll become desperate for a break, we will take a break after we get through the ruling on the motion to dismiss, and we'll break before we come back to take up the arbitration motion.

Turning then to the motion to dismiss, Docket 193. As I've said a moment ago, in consideration -- or the ruling I'm about to provide is in consideration of the defendants' opening brief, Docket 193; the plaintiffs' opposition, Docket 200; the plaintiffs' reply, Docket 208; the defendants' corrected supplemental brief, Docket 234;

the plaintiffs' response in opposition to the corrected supplemental brief, Docket 239; defendants' additional supplemental authority, 242; the response to that authority, Docket 243; and then a careful review of our hearing transcript. And I thank counsel again for your excellent oral argument on the motions.

In this putative class action antitrust case, six broiler chicken growers assert, in a consolidated amended complaint, two causes of action against the defendants who are broiler chicken integrators, companies that purchase the broiler chicken grower services.

In their first cause of action, the plaintiff growers assert a claim arising under Section 1 of the Sherman Act, 15 United States Code, Section 1. I'm referring now to the amended complaint, Docket 137 and Paragraphs 165 to 169. In that claim, plaintiffs contend the integrator defendants, together with other integrators, formed a scheme not to compete amongst each other for grower services in order to suppress grower compensation. Plaintiffs allege this scheme is per se illegal under the Sherman Act, and that it was effectuated through certain facilitating agreements or practices, including, among other things, first, the exchange of detailed current disagregated grower compensation data; and, second, by entering into agreements not to solicit or poach each other's growers.

In their second cause of action, the growers assert a claim for unfair practice in violation of Section 202 of the Packers and Stockyards Act, 7 United States Code, Section 192(a). This is Paragraphs 170 through 178. The defendant integrators jointly moved to dismiss the plaintiff growers' consolidated amended complaint with prejudice pursuant to Rule 12(b)(2), 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure. And respectively, of course, these rule provisions concern dismissal for lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief can be granted.

The defendant integrators contend the growers have not plausibly alleged a Sherman Act claim, nor a PSA claim. Further, the integrators argue that the growers have not shown that venue is proper in this district for the PSA claim. And the defendants further argue that, if the Sherman Act claim is dismissed, then any PSA claim brought on behalf of non-Oklahoma plaintiffs must also be dismissed for lack of personal jurisdiction.

We'll take a moment I think at the outset and survey the plaintiffs' consolidated complaint that is the basis for the motion to dismiss. The factual background, as I said, is drawn from the allegations in that complaint, and they are assumed at this stage to be true. And I cite *Abdi vs. Wray*, a Tenth Circuit decision from 2019. Its factual

background will be familiar to all of you, though I understand that some of it will be -- much of it will be disputed by the defendants later in the case.

Broiler chickens account for nearly all domestic chicken consumption. Their production is concentrated in localized networks controlled by vertically integrated companies like the defendants, who control nearly every aspect of production under agreements known as Contract Farming Arrangements, or CFAs, with thousands of domestic poultry growers. Citing Paragraph 45.

The CFAs are substantially similar across the integrators with nearly identical compensation terms. Paragraph 57. The integrator defendants do not permit their growers to provide grow-out services to any other integrators. Paragraph 58. Growers are also barred under their CFAs from sharing confidential compensation information. Paragraph 64.

And now I'm going to refer at times today to the defendants, and of course the original consolidated amended complaint named five defendant families as I think of them. And several of them have been dismissed, as we said, the Sanderson and Koch parties most notably. But I'll be referring to the defendants collectively as they were named in the consolidated amended complaint for at least two reasons. One, those are the allegations before us. And,

second, while they are no longer here, at least the Koch and Sanderson related parties are still alleged to be defendants that engaged in this conspiring agreement in restraint of trade.

The defendants are the five largest U.S. poultry integrators accounting for 60 percent of the grower services. Paragraph 46. And as a result of a market shift toward integration, there are only about 25 integrators in the nation, and they collectively contract with about 97 percent of the domestic poultry growers, and that total is around 30,000. I'm citing Paragraph 50. Growers provide the land and specified facilities or so-called grow-out houses, which can cost as much as $300,000 or more to build, and those facilities are designed to care for chickens until the integrators take them. Growers often go into substantial debt to begin providing grow-out services. And even a well-performing grower may spend decades recouping his or her initial investments. The integrators provide birds, veterinary services, and supervision to the growers. I'm citing Paragraphs 53 and 54, 59 and 61.

Since 2008, the defendants and other integrators who control 120 broiler chicken complexes, about 98 percent of domestic broiler production, have shared detailed non-public contemporaneous grower compensation information, which is not shared with the growers

themselves. Paragraphs 66, 69 and 75. The integrators share data on a weekly basis by disseminating to and receiving from a third party company, Agri-Stats, the data. Agri-Stats is a research firm whose mission is to "improve the profitability" of its clients. And I've omitted some of the language in the middle there that was not material. Paragraphs 68 through 69, 72 and 75.

The information defendants and other integrators share through Agri-Stats includes information on complexes both regionally and based on individual farms. Paragraphs 69 and 71. Defendants and other integrators share granular data on grower compensation, as well as numerous other categories of information concerning their complexes, including general locations, monthly profits per live pound, anticipated capacity, future output, equipment, breeder stock characteristics, the number of chicks delivered, broiler weights and mortality rates, production rates per square foot, feed and medicine use, and transportation costs. Paragraph 70.

The information is purportedly anonymous, but lacks the safeguards necessary to prevent one with knowledge in the industry from identifying which data belongs to which defendants or other integrators, or which would prevent people with knowledge in the industry from using that data to determine grower compensation. Paragraphs 73 and 74.

In addition to the information shared through Agri-Stats, the defendants and other integrators also share chicken feed samples, Paragraph 76; permit access to each other's complexes, including to Sanderson and Perdue complexes in North Carolina, Paragraph 77; and high level employees among integrators move freely amongst the competing companies, unbounded by non-compete and confidentiality agreements, Paragraph 78.

Plaintiffs allege defendants and other integrators have an agreement not to solicit or to recruit one another's growers. Paragraph 79. And evidence of this includes the following: According to a letter written to the federal Grain, Packers and Stockyards Administration, one Tyson grower complained that he had inquired about a job posting by non-defendant integrator Peco Foods, but when he called Peco Foods, he was told that "the companies had an agreement among each other not to take each other's growers." Paragraph 80.

Quotes from articles and workshops suggesting growers have experienced challenges in being hired by other integrators are also included as well as -- well, and that that information from the workshops and articles cause some in the industry to believe that the companies have entered into no-poach agreements. That information is set out in Paragraphs 81 and 82. And the plaintiffs further point to

data, including the fact that only a small percentage of growers switch integrators each year. For example, in 2014, only 2.88 percent to five percent of integrators changed -- excuse me -- of growers changed integrators. That's set out in Paragraphs 85 through 87. And the plaintiffs say that's telling in view of the fact that 75 percent of growers have more than one integrator in their geographic area and could, therefore, theoretically switch integrators but for the alleged no-poach agreement. Paragraph 89.

Plaintiffs allege that when growers do switch integrators, the switch is accompanied by, if not driven by a benefit to the integrator. And citing what appears to be a hypothetical example in the complaint, the plaintiffs describe a scenario under which one integrator may have excess processing capacity and may, therefore, hire another integrator's growers if the second has too many growers at the time. That's set out in Paragraph 88.

The complaint identifies industry factors, so-called plus factors, that the plaintiffs contend render the industry susceptible to collusion and bolster the plausibility of the overarching scheme that's alleged in the complaint. And according to plaintiffs, these factors include: High barriers to entry for integrators; two, high exit barriers for growers, including requisite upgrades and debt burdens; number three, inelastic demand; number four,

industry concentration; number five, fungibility of grow-out services; number six, opportunities to collude, including regular meetings of the National Chicken Counsel, three annual board meetings at least, and industry leadership involvement among representatives of the various defendants.

More, plaintiffs point to the fact that the industry has been subject to antitrust scrutiny in the past, and they point to the fact that the Department of Justice in the 1970s shut down regular industry conference calls during which broiler production and prices were discussed. That's in Paragraph 125. Plaintiffs maintain that Agri-Stats has effectively replaced those weekly conference calls.

The complaint provides information and allegations concerning a relevant market and monopsony power. In this respect, the plaintiffs allege the defendants "collectively possessed market and monopsony power" in the relevant market, which the plaintiffs define as -- which the plaintiffs define as the purchase of grower -- excuse me -- broiler grow-out services in the United States. Paragraphs 129 and 136. Defendants buy more than 60 percent of those services. Paragraph 132. Plaintiffs allege that the uniform CFAs that integrators impose with identical or nearly identical compensation levels necessarily suppress grower compensation "in all geographic regions in the United States." Paragraph 134.

And plaintiffs maintain that, absent this, the integrators would compete and might open plants where other integrator companies already exist. Paragraph 135.

The complaint goes on to identify alleged anticompetitive effects of this scheme and injury suffered by the class, or the putative class. Plaintiffs allege grower compensation levels have been suppressed below competitive levels due to the information sharing scheme, Paragraphs 137 to 140, and the no-poach agreement, Paragraphs 141 and 142. And due to suppression and the law of supply and demand, this necessarily results, the plaintiffs maintain, in fewer broilers being produced than would otherwise be produced if the growers were paid competitively, further resulting in reduced broilers on the market and a higher market price to consumers. Paragraph 145.

And in this section of the complaint, the plaintiffs discuss the tournament system, which fixes grower compensation based on how growers rank against one another on feed conversion rates and then apply formulaic guidelines. The shared compensation information, plaintiffs maintain, is used to set tournament system levels wherein top growers receive base pay plus an incentive, while bottom performing growers receive base pay less a disincentive. Plaintiffs allege this system is one means by which the

scheme artificially reduces grower compensation. Paragraph 146.

So against that factual background, these are the legal standards that the Court thinks are governing and that I'm required to apply to the motion.

The defendants maintain in the Rule 12(b)(6) challenge to the plaintiffs' Sherman Act claim that the claim is subject to dismissal because the plaintiffs have not plausibly alleged agreements amongst the defendants either to poach each other's growers, or to exchange illicit information.

The pleading standards are familiar to all of you. Dismissal under Rule 12(b)(6) is appropriate only if the complaint, viewed in the light most favorable to the plaintiff, lacks enough facts to state a claim to relief that is plausible on its face. And I'm citing again the *Abdi* decision from the Tenth Circuit.

In deciding whether the plaintiff has adequately stated a claim for relief, I'm required to view the allegations in the consolidated amended complaint in the light most favorable to the plaintiffs, accepting the well-pled facts as true, and drawing all reasonable inferences in the plaintiffs' favor. More language from *Abdi* at Page 1025.

To avoid dismissal, plaintiffs' consolidated

amended complaint must comport with Rule 8(a)(2) of the Federal Rules of Civil Procedure which requires a short and plain statement of the claim showing that the plaintiffs are entitled to relief. The Rule 8 pleading standard, the Supreme Court has told us, does not require detailed factual allegations, but it demands more than an unadorned accusation. That's language from *Iqbal*, the 2009 decision from the Supreme Court. A claim offering labels and conclusions, or a mere formulaic recitation of the elements of a cause of action are insufficient. The court explained that in greater detail in *Iqbal*. Also insufficient are claims tendering naked assertions devoid of further factual enhancement.

Rather, to survive defendants' Rule 12(b)(6) challenge, the plaintiffs must allege sufficient factual matter accepted as true to state a claim to relief that is plausible on its face allowing the court to draw the reasonable inference that the defendants are liable for the misconduct alleged. More language from *Iqbal*. And while the court generally must accept factual allegations in a proposed claim as true, it is not bound to accept as true legal conclusions couched as factual allegations. That was explained in *Twombly* at Page 555. *Twombly*, of course the 2007 Supreme Court decision, and we'll be talking more about that in a moment. Rather, the factual allegations must be

enough to raise a right to relief above the speculative level. More language from *Twombly*.

And when considering plausibility and fair notice to the defendants, the degree of specificity necessary in the plaintiffs' complaint necessarily depends on the context. So said the Tenth Circuit in *Robbins vs. Oklahoma*, a 2008 decision.

So I'll discuss the contours of the plaintiffs' Sherman Act claim more in a moment. But as the Supreme Court stated in *Twombly*, such a claim, at the least, requires allegations containing enough factual matter taken as true to suggest that an agreement was made. That's at Page 556 of Justice Souter's decision. Such an agreement must be plausible, though not necessarily probable. There simply must be enough facts "to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." That quote drawn also from Page 556. And the court continued, "Thus, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and that a recovery is very remote and unlikely." And as then-Second Circuit Judge Sotomayor reminded us in *Todd vs. Exxon Corp.* cited and relied upon by both sides in the context of this Rule 12 motion, "No heightened pleading standard" -- excuse me -- "No heightened pleading requirements apply in antitrust

cases. A short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases as in other cases under the federal rules." Of course, that's a 2001 decision and I'm omitting the internal citations. As then-Judge Sotomayor continued, "Furthermore, in antitrust cases in particular, the Supreme Court has stated that dismissals prior to giving the plaintiffs ample opportunity for discovery should be granted very sparingly."

So turning now more specifically to the Sherman Act claim, the Sherman Act, 15 United States Code, Section 1 provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. A plaintiff asserting a claim under Section 1 must prove not only the existence of an agreement or conspiracy between two or more competitors to restrain trade, but also that the restraint is unreasonable. That's a quote from the Tenth Circuit in 2017, the case, *Buccaneer Energy vs. Gunnison Energy Corporation*.

Restraints are found to be unreasonable in two ways. First, a small group of restraints are unreasonable per se because they always, or almost always tend to restrict competition and decrease output. That's a

quote from the Supreme Court in *Ohio vs. American Express*. Put another way, agreements or practices are per se unreasonable where, because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and, therefore, illegal without elaborate inquiry as to the precise harm that they have caused or the business excuse for their use. That's a quote from the *Buccaneer* decision from the Tenth Circuit.

For example, under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. That's a quote from *United States vs. Socony-Vacuum Oil Company*, a 1940 decision from the Supreme Court. And, likewise, more recently, the Tenth Circuit has stated that "horizontal price fixing and group boycott are per se violations, so a plaintiff's failure to allege a relevant market is not fatal to such a claim." That discussion is in *Campfield vs. State Farm Mutual*, a 2008 decision.

In contrast, restraints that are not per se unreasonable are evaluated under the rule of reason, which requires a fact-specific assessment of market power and market structure to assess the restraint's actual effect on

competition. Language again from the 2018 *American Express* decision by the Supreme Court. And as the Tenth Circuit said in *Buccaneer*, the rule of reason is the default approach, and there is a presumption in favor of its application. Under the rule of reason, the court seeks to ascertain the extent to which challenged conduct harms competition, and then to determine whether any such harm is nonetheless justified by countervailing procompetitive benefits.

So with those principles in mind, I'll now turn to the defendants' specific challenges to the plaintiffs' Sherman Act claim.

Defendants contend that the plaintiffs have failed to plead adequately their Sherman Act claim. In their opening brief, the defendants insist that the Court should look past how the plaintiffs chose to plead their claim, that is as an overarching scheme, illegal per se, not to compete for grow-out services with facilitating information sharing and no-poaching agreements. Instead, the defendants ask us to evaluate those facilitating practices distinctly as two separate agreements or claims independently themselves. This argument is set out at Page 8 of Docket 193.

And at least in my judgment, in essence, I construe the defendants' argument to be that the plaintiffs'

Sherman Act claim fails because it inadequately pleads two Sherman Act claims that the plaintiffs are not independently asserting. It seems to me, at its core, the defendants are trying to redraft the plaintiffs' complaint. And, of course, this they may not do.

Defendants urge that, when considered separately, the defendants' pleading falls short. Defendants argue that the no-poach agreement fails because plaintiffs do not offer sufficient factual support for it, and because there are obvious alternative reasons why growers do not switch amongst integrators. And defendants urge that, when considered distinctly, any information sharing agreement must be analyzed under the rule of reason, and that, under that rule, that claim fails. Defendants only very briefly addressed the plaintiffs' overarching per se scheme allegation in a few paragraphs only in their opening brief and in reply. Defendants fleetingly argue that the claim is factually unsupported, and that the Court must analyze each agreement separately, and that the information sharing claim, as I said, must be evaluated at this stage under the rule of reason. The treatment of this issue and the overarching claim is addressed in Docket 193 at Pages 18 and 20, and Docket 208 at Pages 3 and 4.

The plaintiffs respond that the consolidated amended complaint plausibly sets forth a single overarching

conspiracy or scheme among the defendants not to compete for broiler chicken grow-out services which had the effect of keeping grower compensation artificially low. This discussion in paragraph -- excuse me -- in Docket 200 at Page 15, and Docket 137, Paragraphs 1 through 4. That's the consolidated amended complaint.

In their briefing and in the consolidated amended complaint, plaintiffs allege that the scheme is illegal per se under the Sherman Act. Docket 200 at Page 10, the amended complaint at Paragraph 169. Plaintiffs allege the overarching scheme had at least two complimentary and mutually reinforcing elements. As we've said, first, the agreement to share current, detailed, sensitive and confidential business information, including grower compensation. And that this agreement enables compensation suppression, and allows conspiring integrators to monitor input prices resulting in coordinated compensation levels which disincentivises growers from switching amongst those integrators. And then, second, a complementary no-poach agreement not to solicit or hire growers from other conspiring integrators, resulting in the growers' complete inability to switch amongst at least those participating integrators.

As I've said, while the plaintiffs urge the Court to evaluate the two mutually reinforcing elements of

their alleged scheme together and to evaluate them in their full context, they also argue that, if analyzed separately, each component of the scheme is sufficiently alleged as an independent violation of the section act -- or, excuse me -- Section 1 of the Sherman Act, and that the defendants' arguments at this early stage, Rule 12, essentially amount to affirmative defenses. That argument is on Page 10 of Docket 200.

I decline for the reasons I'm going to now explain -- at this stage of the proceeding at least, I decline the defendants' invitation to recast the plaintiffs' per se Section 1 Sherman Act claim plaintiffs clearly set forth in their consolidated amended complaint as two separate claims which must be separately analyzed.

Though the defendants offered separate analyses of the information sharing and no-poach agreements in their opening brief, their explanation concerning why the Court -- they maintain -- the Court was required to analyze them separately at the motion to dismiss stage was less than compelling in both their opening brief and the reply brief. And it leaves me, in my judgment, without a firm basis on which to reach such a legal conclusion at this time. And I feel like that might have been dense and not very clear. What I mean is, the defendants have not persuaded me that I'm required to disassemble the plaintiffs' single alleged

Sherman Act claim, and, instead, evaluate the component constituent parts independently as if they were asserted as independent claims under the Sherman Act.

And the cases cited by the defendants' briefing leave me unpersuaded, as I've said, at this early stage that the plaintiffs' overarching scheme must be evaluated as two separate agreements. First, both sides discuss in their papers *Todd vs. Exxon*, that 2001 decision from the Second Circuit authored by now-Justice Sotomayor. Defendants cite it for the proposition that, that while plaintiffs -- "while plaintiffs allege a per se violation of the antitrust laws, they cannot show this allegation with an information exchange agreement, because it is well-settled that information exchanges are addressed under the rule of reason." That's set out in Docket 193 at Page 18. But *Todd* only expressly provides that information exchange claims asserted independent of an alleged unlawful agreement -- excuse me -- independent of an alleged unlawful agreement, in that case, of course, to fix salaries for certain employees. Only independent claims of that nature are analyzed under the rule of reason. In that decision, then-Judge Sotomayor explained that horizontal price-fixing agreements, illegal per se under the Sherman Act, may be shown with evidence of "facilitating practices" such as information exchange. A quote from Page 198 of that

decision. "Even in the absence of direct smoking gun evidence, a horizontal price-fixing agreement may be inferred on the basis of conscious parallelism where such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendant's use of facilitating practices. Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement."

The court of appeals there distinguished the use of information sharing as a facilitating practice showing a per se illegal price-fixing agreement with the "closely related but analytically distinct type of Section 1 claim where the violation lies in the information exchange itself, as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement." This distinct information sharing claim, recognized in many cases cited in the papers from *Maple Flooring* on, is analyzed under the rule of reason. But in *Todd*, the court of appeals analyzed the information sharing at issue under the rule of reason because the plaintiffs had not alleged an actual agreement among defendants to fix salaries.

In contrast to the *Todd* case, the plaintiff growers here have alleged an overarching horizontal agreement amongst the integrators to refrain from competing for grower services for the purpose of depressing grower

compensation. Defendants do not contest that this would be a per se -- excuse me -- do not contest that this would be a per se violation of the Sherman Act. And I conclude that plaintiffs may, at this early stage, support their allegations of that scheme in violation of the Sherman Act per se with allegations of facilitating practices such as sharing detailed non-public information, as well as other plus factors plaintiffs identify from Paragraphs 90 through 128 in the consolidated amended complaint which "render the industry susceptible to collusion and bolster the plausibilty of the scheme." And those include, as I've said, the high entry barriers for integrators, the high exit barriers for growers, inelastic demand for both broilers and grower services, industry concentration, fungibility of grow-out services, and numerous opportunities to collude.

Defendants also cite and rely on *In Re Processed Egg Products Antitrust Litigation*. It was a 2016 decision from the Eastern District of Pennsylvania. And, specifically, defendants rely on it for the proposition that the facilitating practices described in the plaintiffs' Sherman Act claim must be evaluated separately before the plaintiff can proceed at the motion to dismiss stage.

I don't read that case, as I've said, from another district court in Pennsylvania to so require that result. First, that case, like many of the cases relied on

and cited by the defendants, that case was decided at summary judgment. The plaintiffs there had alleged the defendant egg producers had conspired in violation of Section 1 to reduce the domestic egg supply in an effort to raise prices, and it's set out at Page 1036 of the district court decision. The conspiracy was allegedly facilitated by three programs, including a producer certification program which increased minimum cage space per bird. And in the summary judgment motions before the court, the defendants focused solely on the certification program, arguing it could not amend to a per se violation, but, instead, had to be analyzed under the rule of reason. The court found that issue a proper mode of legal analysis, as the court described it, and presenting a legal question in the court's view that was appropriate for summary judgment. This is explained at Page 1039 of that decision. And the trial court went on to explain that it concluded it would evaluate the certification program separately and under the rule of reason, despite the plaintiffs' arguments that the defendants' collective actions in furtherance of the conspiracy must be viewed as a singular attempt by the defendants to artificially reduce egg supply, and that the conspiracies to reduce egg supply were per se unlawful. That's all explained at Page 1040 of the decision.

The court, nevertheless, did evaluate the

claims separately -- the arguments separately and under the rule of reason without clear precedent supporting that specific determination, but, instead, simply stating that the plaintiffs' position "cannot possibly be correct" because it would subsume the rule of reason in most, if not all, circumstances. That discussion, the relevant discussion again at Page 1040 of the decision.

I am not so confident as the district court in Pennsylvania that that is correct, or that this is a reason to reject a plaintiffs' view of their own claim at the Rule 12 stage. Indeed, doing what the *Egg Products* court did arguably undermines the plaintiffs' ability to do something numerous courts have said plaintiffs may do; prove a per se illegal price-fixing agreement with circumstantial evidence and plus factors. It strikes me as strange that we would break down each piece of a component of the component evidence tending to show the agreement, and determine whether, on its own, each piece satisfies the rule of reason.

Nonetheless, for reasons that I will explain in just a moment, my preliminary view of this issue is not dispositive to my ruling on the Rule 12 motion, or whether the case continues because, as I'll explain, I conclude that at least the information sharing agreement is sufficiently alleged under the rule of reason.

And the Court's decision at this stage and on the limited briefing on this particular issue does not foreclose the parties from raising this issue again at summary judgment with more fully developed arguments and with the benefit of a factual record. Indeed, summary judgment, or appeal therefrom, is the posture of most of the relevant cases cited by the defendants. But I just don't find those cases conclusive at this stage of the litigation, and on the sparse analysis that the defendants offer in support of some of their arguments.

And I acknowledge that the less than entirely clear language from Justice Kennedy in the *Leegin Creative Leather Products* case to the effect that, if a vertical agreement setting resale prices is made to support a clearly per se illegal horizontal cartel, then the unlawfulness of the resale agreement would need to be proven by the rule of reason. I acknowledge that language. It's the 2007 decision. That language is found on Page 893 of the decision.

And he continued, Justice Kennedy did, to state that this type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel. It's unclear to me at least, even under that language, that these agreements supporting the finding of a horizontal agreement that is per se illegal

must be independently proven under the rule of reason. But I concede that conclusion could change if the argument were further developed, and we'll have to -- my guess is we'll have to evaluate it again at summary judgment.

Briefly, in their discussion of this issue, the defendants also cite in their papers *In Re Citric Acid Litigation*, the 1999 decision from the Ninth Circuit for the I think fairly unremarkable proposition that courts have rejected evidence of an information exchange alone as sufficient to support a finding that there is a conspiracy. But the posture and facts of that case are quite distinct from those here where we are simply setting the pleadings at a Rule 12 stage. In the *In Re Citric Acid Litigation* case, there was an admitted conspiracy in the citric acid market, but Defendant Cargill denied participating with other conspirators. After class certification and after discovery, Cargill obtained summary judgment on the plaintiffs' claim it had used trade organization meetings as a vehicle for engaging in a conspiracy.

Conducting an independent review of the evidentiary record on appeal, the court of appeals there found there was no evidence to support the plaintiffs' claim. After disposing of plaintiff's argument that Cargill participated in meetings where price fixing was admittedly discussed by others, the court rejected plaintiffs' claims

that studying and meeting to discuss information about Chinese citric acid producers was enough to support an inference of a conspiracy involving Cargill, particularly where minutes from the meeting indicated those in attendance had rejected a suggestion to contact Chinese producers in an effort to stabilize prices. That discussion is on Page 1098 of that decision.

For all of those reasons, I am unconvinced at this stage that plaintiffs' overarching per se scheme claim must be broken down and analyzed agreement by agreement, including through the application of a rule of reason analysis for the information sharing practices that are alleged. Rather, as the plaintiffs state in their briefing, together plaintiffs' allegations state a Section 1 claim. Defendants' motion does not assert otherwise. That's language from Docket 200 at Page 10.

And in the language of the *Twombly* decision, beginning at Page 1966, the court said, "It makes sense, therefore, to say that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a Section 1 claim, they must be placed in a

context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." And that is exactly what I think the plaintiffs have alleged here.

And for that reason the defendants' Rule 12 motion will be denied. But even if I were required at this stage, as the defendants urge, to analyze the overarching schemes two primary facilitating practices or agreements separately, as I've already said, I conclude the information sharing agreement is adequately alleged under the rule of reason. And though it's a close -- I think a close decision, I also conclude that, if it was analyzed separately and required to be adequately pled separately, the no-poach agreements -- excuse me -- the no-poach allegations at least fall short of plausibly alleging an agreement amongst the integrators not to hire one another's growers.

So in the interest of completeness, and transparency in my ruling, and to the extent that it helps inform the decisions all of you are going to make going forward, even though I've already said that I think the motion fails and that I'm not required to engage in this analysis, I am, in this instance at least, nevertheless, going to provide it. I think it may be helpful and beneficial to all of you, and especially if we end up

revisiting this at Rule 56. I'll first take up the alleged no-poach agreement.

Plaintiffs allege that, as part of the scheme to suppress grower compensation, defendants and other integrators agreed not to solicit or recruit one another's growers. That allegation is set out in the consolidated amended complaint at Paragraph 79. Plaintiffs assert they have alleged facts proving both directly and circumstantially this unwritten pact or agreement. And as I said, though it's close, I conclude the plaintiffs have not plausibly shown the existence of a no-poach agreement, at least on the basis of the allegations contained in the consolidated amended complaint.

First, plaintiffs discuss a letter written to the federal Grain, Packers and Stockyard Administration in which one Tyson grower complained that he had inquired about a job posting by non-defendant integrator Peco Foods, but that when he called Peco Foods he was told by an assistant that "the companies had an agreement among each other not to take each other's growers." That's in Paragraph 80 of the complaint. Plaintiffs are unable to, or fail at least, to identify who wrote the letter, when it was written, what area of the country the grower was in, or any other information surrounding the letter and the circumstances it describes concerning the call that was made. If more detail

had been included, such as dates as perhaps the identity of the grower, it may well be evidence of an agreement. But as it is alleged, in my view, it falls short.

I may have said this at oral argument, and I continue to study the allegations in the complaint. I think, mindful of the legal standard that applies and drawing the reasonable inferences from the facts alleged in the complaint in the plaintiffs' favor, still, at most, in my view, that allegation provides a reasonable inference that Peco may have had an agreement with Tyson. Not that the named defendants in this case had an agreement amongst themselves. And it tells us nothing about when that agreement may have existed. That's especially important I think in the view of the nature in the view of the overarching conspiracy alleged by the plaintiffs.

Next, plaintiffs allege unattributed grower statements from articles and workshops suggest growers have experienced challenges being hired by other integrators and, for that reason, that they believe the companies have a no-poach agreement. These allegations are found primarily in Paragraphs 81 and 82. One quote is from a grower who started working in the industry in 1995. That is the only date alleged in the discussion of the articles and workshops. Not even the dates of the articles or workshops is alleged in the complaint. The nature of these

allegations, without strong corroborating evidence, is simply a perception of unidentified growers and unidentified integrators at unidentified times. And in my judgment, even drawing the reasonable inferences in favor of the plaintiff, that's insufficient.

As indirect evidence, plaintiffs allege that only a small percentage of growers switch integrators each year. And they point, as I've said, to 2014 as an example where somewhere between just under three percent to five percent of growers changed integrators. These allegations are in Paragraphs 57 -- excuse me -- 85 and 87. This, they complain, is despite the fact that 75 percent of growers have more than one integrator in their geographic area and could, therefore, theoretically switch but for the alleged no-poach agreement. This is explained in Paragraph 89.

But in view of the lack of direct evidence, and for the reasons the defendants discuss in their briefing, the Court cannot conclude that those facts plausibly suggest the existence of a no-poach agreement. Low switching numbers could be due to a number of other factors such as the initial investments a grower might make in their facilities to comport with specific integrator requirements. And let me say, I considered the fact that one might reasonably infer -- I think -- I think this gets tricky at Rule 12, drawing a line between those inferences

the Court concludes are reasonable inferences to draw from the allegations, and then, when you've crossed that line and you've essentially written new allegations for the plaintiffs, which I'm not permitted to do. I don't read the plaintiffs to allege that those threshold build-out requirements are part and parcel with the alleged conspiracy because they act to prevent the growers from moving from one integrator to another. I don't see that allegation in the complaint. I don't understand it to be part of the theory. And for that reason, I don't think it's fair for me to draw that inference, even though I think it is an inference that could be drawn from the facts that are set out in the complaint. And I'm not drawing that inference for purposes of my analysis today.

On this point of the low number of growers who switch integrators, the plaintiffs allege that when the growers do switch, it's to benefit the integrator, not the grower, and that the change is accompanied by a benefit to the integrator. But in support of this contention, the plaintiffs merely theorize, and what I -- it just strikes me as a hypothetical example describing a scenario in which one integrator may have excess processing capacity and may, therefore, hire another integrator's growers if the second has too many growers at the time. But that alone, again, even drawing the reasonable inferences in favor of the

plaintiff, fails to carry the no-poach claim across the line of plausibility.

And absent plaintiffs' allegations are facts suggesting how much growers tried to switch in any given year but were unable to do so. Indeed, there's not -- there's not a single allegation that I could see in the complaint concerning any identifiable grower, including any plaintiff who attempted to change integrators but was unsuccessful or was denied that opportunity. Of course that's not required to be stated, but when required to consider the allegations in the complaint as a whole.

For all of those reasons, I conclude that if the plaintiffs had pled as an independent Sherman Act violation on its own the no-poach agreement, which plaintiffs did not do, that the allegations in the complaint do not plausibly state a distinct Sherman Act violation.

Next I'll take up the information sharing agreement. Certain exchanges of information can give rise to distinct Sherman Act violations that would be evaluated under the rule of reason. And I'm citing here *Todd* at Page 198. When evaluating such an exchange under the rule of reason, of course the court is required to consider a number of factors, including most prominently the structure of the industry involved and the nature of the information exchanged. That discussion is also in *Todd* where Justice

Sotomayor, then-Judge Sotomayor was quoting the *Gypsum* decision.

Concerning the nature of the information, courts have found it less troubling when the information exchanged was public and historical rather than confidential and current. For example, in the *Maple Flooring* decision that the parties cite throughout the papers, the Supreme Court sought to determine whether information shared by numbers of a wood flooring trade association "will necessarily have that effect so as to produce that unreasonable restraint of interstate commerce which is condemned by the Sherman Act." That's from Page 572. And of course the court went on to answer that question, no, under the circumstances of that case, where there was no indication the defendants had entered into an agreement, and the sales and pricing information shared was both public, published in trade journals, and based on historical transactions rather than current data.

In contrast, the plaintiffs here contend that they have included sufficient allegations in the consolidated amended complaint to state a cognizable information sharing claim under the rule of reason. They allege that, at least since 2008, the defendants and other integrator companies who control 98 percent of domestic broiler production have shared detailed, confidential,

nearly contemporaneous information on complexes, profits, capacity and output, a variety of costs and compensation. And that that data is neither shared with the public, nor even with the growers themselves. And I'm citing Paragraphs 66, 69 and 75 of the complaint. Plaintiffs further allege that the integrators and other -- excuse me -- the integrator defendants and other integrators share that data on a weekly basis by disseminating their information to and then receiving back information from other integrators, including the other integrator defendants through the Agri-Stats research firm. Paragraphs 67 through 69, 72 and 75.

Though the information is purportedly anonymous, the plaintiffs maintain it lacks safeguards to prevent anyone knowledgeable in the industry from identifying which data belongs to which integrator, and then using that to determine grower compensation. Paragraphs 73 and 74. In addition to the information shared via Agri-Stats, the defendants and other integrators also shared chicken feed samples, permit access to each other's complexes, including to now-dismissed Sanderson and Perdue complexes in North Carolina. Paragraph 77. And that the defendants have numerous opportunities to share information in person. Plaintiffs further allege that high level employees move freely amongst companies unbounded by

uncompete -- non-compete, rather, and confidentiality agreements, and that the integrators through executives attend numerous industry meetings each year.

Defendants contend that these allegations don't help -- do not help plaintiffs establish an information sharing claim under the rule of reason for three primary reasons: First, that the plaintiffs are unable to show an agreement amongst one another to share the information; second, that there are competitive explanations for sharing the information; and, third, that the plaintiffs failed to plead plus factors that would make the agreement more plausible.

And, additionally in briefing that developed after our last hearing really -- I think this argument was made initially in a footnote, and then developed further in reply, and then a great deal more after hearing the defendants contend the plaintiffs have failed to plead a plausible relevant market or an anticompetitive effect on that market, and for those reasons, the defendants contend any information sharing claim fails. I disagree.

First, I find the plaintiffs have sufficiently alleged an agreement to share information of the very kind and quality that troubles courts considering these claims, and that that happened since at least 2008 when the defendant integrators and other integrators have

provided information to Agri-Stats knowing it would be disseminated and that, in return, they would receive similar information. And while defendants contend that all they did was independently decide to participate in benchmarking, this ignores the reality of what the plaintiffs allege, at least in my view. That is, the reciprocal horizontal agreement to exchange sensitive, detailed, current nonpublic information. Plaintiffs contend that defendants did not provide the highly sensitive, detailed, current nonpublic information in a vacuum or as an act of public service. They contend that they provided it because it would be their ticket to receive the same sensitive, detailed, current nonpublic information from all the other participating companies. And that, in fact, that is -- and that they, in fact, do share that information and they, in fact, do receive that information in return.

Plaintiffs allege the who; the defendants and other conspiring companies identified in the consolidated amended complaint. They identify the what; the exchange of sensitive, detailed, current nonpublic information with the expectation that they would receive and they do receive the same in return. They describe the when; since at least 2008. And the why; to reduce their costs, including grower compensation.

Defendants, at least in my view, do not

squarely grapple with the reciprocal nature of the exchange alleged, or the nature of the information exchanged, which is in material contrast to the kind and type and quality of information at issue in *Maple Flooring* and other related cases. In the *Maple Flooring* case, as I've said, the information was not current, and it was disseminated publicly in trade publications.

I find that the plaintiffs have sufficiently alleged an agreement to disseminate the sort of information that causes heartburn for courts considering Sherman Act information exchange claims.

And though defendants make much of the fact they are not alleged to have met in person to exchange information or develop benchmarks, as was true in some of the other cases they cite and rely on, I fail to see how it's material whether they meet in person, email the information, post it on a confidential Google doc, or provide it to one another through a third party conduit, like Agri-Stats, who then disseminates the information among the participating integrator defendants and others.

Viewing the facts favorably to the plaintiffs, as I must at this stage, the defendants would have been aware of the sensitive and current nature of their own business information they were willing to share, and they knew they would receive, and in fact did receive the

same information in return. Plaintiffs allege it is possible, due to the granular nature of the data and information, to ascertain which company provided the information. Defendants do not explain adequately, in view of these allegations -- how, in view of these allegations, rather, it's material that Agri-Stats acted merely as a middle-man or a clearinghouse or a data refiner, instead of requiring the defendants to directly meet in person and exchange the same information in person. Defendants do not explain what difference it would make, if any, if the defendants met in person and handed identical information to one another in a meeting, or handed it to an assistant who compiled it into tables and binders.

The allegation and the theory, again which I am required to assume to be true at this stage of the proceedings, is that the defendants knew that providing Agri-Stats their sensitive information would provide them reciprocal access to the same information from the others.

Next I consider the defendants' proffered explanations for their reciprocal exchange of the sensitive, detailed, current nonpublic information with one another. Defendants contend that information exchanges help companies compete. This is set out in Page 22 of Docket 193. But this does not suggest how the information exchange helped these defendants compete against each other rather than

unreasonably restrain grower compensation. Continuing, defendants argue that monitoring one another's compensation paid to growers makes sense and is consistent with independent business decision making.

Setting aside that the information shared was the sort that courts are routinely concerned about, as I've already said, I simply do not read the plaintiffs to have alleged defendants are independently acting, that is monitoring one another in some kind of conscious parallelism in their own independent but similar business interest as was the case in *Twombly*. Rather, the plaintiffs have alleged the defendants agreed to regularly hand over sensitive, nonpublic information.

At this stage, I find plaintiffs' allegations much more compelling than the insufficiently pled independent actions in *Twombly*, particularly in light of the plus factors that plaintiffs have alleged concerning the movement of executives between companies without confidentiality agreements, the opportunities to meet, the complex tours -- the facility complex tours competing integrators took, and the structure of the market which renders it particularly susceptible to anticompetitive information sharing. That is, it's highly concentrated, involves fungible products, and is subject to inelastic demand.

Finally, a rule of reason analysis will often require a showing of anticompetitive effects in a relevant market. And the parties here spend at least some of the real estate in their papers arguing about whether plaintiffs must necessarily plead a market if they have pled anticompetitive effects. For instance, the Supreme Court in the *Federal Trade Commission vs. Indiana Federation of Dentists* in 1986 observed that a naked restriction on price or output is not justified even in the absence of market power evidence. That discussion is on Page 460 of that decision. But even if the defendant had not engaged in such a naked restriction, the court suggested that sufficient evidence of anticompetitive effects obviated the need for an inquiry into market power which is but a surrogate for detrimental effects.

Either way, the Court need not resolve that issue at this stage because it finds that the plaintiffs have adequately pled a product and geographic market for the reasons that I'll now explain, beginning with the market allegations.

An alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes, analysis of the interchangeability of use, or the cross-elasticity of demand. That's a quote from the *Todd* decision at Page 200.

At Page 129 of the consolidated amended complaint, paragraphs -- I said page -- Paragraph 129, plaintiffs allege the relevant market is the purchase of broiler grow-out services, and the relevant geographic market is the United States.

The Court evaluates these market allegations bearing in mind that the deeply fact-intensive inquiry required in market definitions leads many courts, it seems to me most courts, to hesitate to grant motions to dismiss for failure to plead a relevant product market. And I cite for example the *Todd* decision and the discussion at Pages 199 and 200.

Indeed, many of the cases the defendants themselves rely on do not provide an evaluation of market definitions at the motion to dismiss stage. And I cite the *Tarabashi* decision from the Tenth Circuit in 1991. That was an appeal of findings following a bench trial on relevant market. And the *Buccaneer* decision from 2017, a Tenth Circuit decision that was an appeal from a ruling on summary judgment.

Defendants take issue with plaintiffs' allegations concerning a nationwide geographic market, arguing it is fatally overbroad without any factual support, and lacking in common sense. And these arguments are set out in Pages 3 through 5 of Docket 234. The defendants

argue that it's implausible that growers would sell or integrators would compete with grower services on a national scale. Rather, defendants contend growers cannot plausibly see integrators with a complex across the country as a good substitute.

Even if the court could reach that factual conclusion, it ignores that, absent the challenged conduct, an integrator might compete for grow-out services in a given area by moving into the area, or incentivizing growers to move. And plaintiffs allege this in Paragraph 135 of their complaint. Neither does the defendants' theory account for the fact that a new grower might seek out, or an existing grower might expand business in a different geographic area. And integrators who feared losing new or expanding growers to higher paying areas would presumably compete to retain or retract growers in their geographic area.

In an attempt to meet that reasoning, the defendants cite *Heerwagen vs. Clear Channel Communications*, the Second Circuit decision from 2006, and specifically for the proposition that the grower services market should not be broadened simply because the integrators could buy services nationwide. *Heerwagen* dealt with concert ticket sales of course, as you all know. There, the court rejected the notion that the market for attending live concerts was nationwide where, importantly, after a lengthy evidentiary

hearing, no proof was adduced that a consumer in one city would view a concert in another as a reasonable substitute.

I find that case unpersuasive at this stage. It is logical that individual consumers, in that case concert attendees, investing in one event in one city would not view a concert in a far away place as a reasonable substitute. But it is unclear why it would be simply implausible to think, at this early stage and before we evaluate the evidence, why the integrator companies would not view growers in different areas as possible substitutes.

In any event, the posture of that case underscores the concern that the *Todd* court expressed. That except in situations of apparent implausibility, the court should exercise caution in considering the dismissal of an otherwise plausible, well-pled Sherman Act claim merely on the basis of insufficient market allegations.

I conclude the plaintiffs have adequately alleged, at this early stage, a grow-out services market, and national geographic market, even if some aspects of the market are in a sense local, in the language of the *Grinnell Corporation* case from 1966.

We'll take up the plaintiffs' allegations of the anticompetitive effect of the defendants' conduct, and then we'll break. I think that will be a good time for a break.

Turning to that issue, the defendants contend that plaintiffs fatally failed to plead actual direct anticompetitive effects, where there are no allegations in the consolidated amended complaint that compensation actually changed and by how much after any information exchange. And this argument is I think best presented on Page 5 of Docket 234. And though plaintiffs plead only that the conspiracy began, I think the language of the complaint is in or before 2008, they plead that compensation has been declining since the 1980s, thus making it implausible to blame a decline on a more recent illicit information sharing agreement. But the plaintiffs allege that, since the 1980s, the price of broilers has risen, while the grower's share of the market price has declined. That's Paragraph 151. Even if compensation had also been declining since the 1980s, plaintiffs allege in their consolidated amended complaint that the defendants' scheme caused it to be suppressed below what would otherwise be competitive. And this is found in Paragraphs 137 through 154. Plaintiffs support their allegations with reference to economic theory, guidance from the Department of Justice, and specific facts concerning this industry in particular. And they allege that, specifically since 2007 and 2008, grower pay has declined while there have been increases in broiler wholesale prices. Paragraph 151.

I find the allegations of anticompetitive effect sufficient at this stage of the proceedings.

For all of these reasons then, I find that, even if I am required to consider separately and distinctly from the overarching scheme pled and alleged in the complaint, the constituent agreements, the no-poach and the information sharing agreement, I conclude that the plaintiffs have included sufficient allegations in the complaint to state a cognizable claim under the rule of reason for information sharing in violation of Sherman Act, Section 1. For these reasons, the Sherman Act claim will survive the plaintiffs' (sic) joint motion to dismiss. The overarching scheme, which was not directly attacked, is supported by facilitating practice -- practices, and other -- other allegations and practices that support the inference of the existence of that agreement. Though, as I've said, the no-poach agreement, while close, in my judgment lacks the sufficient factual detail necessary to nudge it over the line of plausibility.

So we'll take a brief break and we'll come back to the Packers and Stockyards Act claim, and then the Arbitration Act. And it occurs to me, I meant to say this at the beginning of the discussion, instead I'm giving it to you at the halftime break, but I could have provided this oral ruling to you over the phone in a conference call. But

what's important, and I thought was important is the business that we have to do following this. And so I still think it was essential that we get together face-to-face, and have a chance to visit about those things. Stretch your legs, get some air, take an aspirin, we'll be back in a bit. Thank you.

(Off the record at 11:22 a.m.)

(Back on the record at 11:37 a.m.)

THE COURT: Welcome back, everyone. We'll go back on the record. We'll continue with the Court's oral ruling.

There was another component to the rule -- a few additional components to the Rule 12 motion to dismiss. So we'll turn now to that portion of the motion relating to the Packers and Stockyards Act.

The defendants argue that plaintiffs' claim for unfair practices in violation of Section 202 of the PSA fails because defendants maintain plaintiffs did not adequately plead any anticompetitive agreement or requisite anticompetitive effects. Docket 193 at Page 25. Of course the PSA was enacted in 1921 with the primary purpose to ensure fair competition and fair trade practices in livestock marketing and in the meat packing industry, and to safeguard farmers against receiving less than the true value of their livestock. At least that's how the Tenth Circuit described it in 2007 in *Been vs. Oklahoma Industries*.

PSA Section 202(a) makes it unlawful for a live poultry dealer to engage in or use any unfair discriminatory or deceptive practice or device. While it was meant to be broader than antecedent antitrust litigation, the Tenth Circuit has recognized that Section 202, nonetheless, incorporates the basic antitrust blueprint of the Sherman Act and other preexisting antitrust legislation. That explains in -- that is explained, rather, in *Been* at 1228. Thus, the Tenth Circuit has held that plaintiffs asserting a Section 202(a) claim must show that the practice injures, or is likely to injure competition. *Been* at 1230. This showing need not include any proof of an intent to cause injury or any other unlawful effect. Thus, in *Been* it was sufficient to create a genuine issue of material fact to defeat summary judgment for the grower plaintiff to show that the defendant was a monopsony in the relevant market, and that economic theory supported the conclusion that, without competition from other buyers, a monopsonist will lower prices paid to sellers, which, over time, results in higher consumer prices.

Under these principles, I conclude, for the reasons I've already explained in denying dismissal of the plaintiff's Sherman Act claim, that the plaintiffs have adequately alleged both an information sharing practice or agreement, potentially illicit on its own, or as a

facilitating practice furthering an agreement -- an overarching agreement amongst the defendants not to compete for grower services, and that anticompetitive effects resulting from the defendants' conduct have been adequately alleged. This suffices for the PSA claim under my reading of the PSA and the *Been* decision, including the "likely to injure" standard it approved, and the nature of the economic evidence the Tenth Circuit found helpful to the plaintiffs in reversing the district court's grant of summary judgment.

Defendants next contend that the plaintiffs' PSA claim must be dismissed because a mandatory venue provision in the PSA renders venue in this district improper. Defendants, in their opening memorandum, selectively cite from the PSA venue statute arguing that the statute "mandates that venue shall be located in the federal judicial district in which the principal part of the performance of a poultry growing arrangement or contract takes place." Citing 7 United States Code, Section 197b(a). Because no defendant performed under its grower contracts in this district, defendants argue venue is thus improper. This argument is set out on Page 27 of Docket 193.

But defendants' opening argument omits, and does not analyze an important part of the venue provision, that it applies only to any dispute among the parties to a poultry growing arrangement that arises out of the

arrangement or contract, in the language of 7 United States Code, Section 197b(a).

After failing to include this provision in it's opening brief, the defendants argue in reply that because all plaintiffs are poultry growers under another part of the PSA, meaning they raise live poultry under a poultry growing agreement, they somehow must be subject to the venue provision because, but for the poultry growing arrangements, plaintiffs would not have standing to bring their claims. This is the argument that develops in Docket 208 at Page 11. I disagree.

The defendants provide no analysis or legal authority upon which I can conclude that plaintiffs' PSA claim is governed by the mandatory venue provision, that the claim amounts to a dispute between parties to a poultry growing arrangement and arising out of the poultry growing arrangement or contract.

As plaintiffs point out, and defendants do not contest in their reply, the PSA claim in this case does not involve only a dispute between parties to a poultry growing arrangement. Rather, each plaintiff was a party under such an arrangement with only one integrator, not all defendants; and, second, therefore a dispute arising out of the arrangement or contract. No plaintiff is seeking to enforce any contractual provision. The mandatory venue

provision in the PSA, at least in my judgment, does not apply in this case.

Finally, the defendants argue that, if the Court had dismissed the plaintiffs' Sherman Act claim, it must dismiss the PSA claims asserted by the non-Oklahoma plaintiffs, all but Haff Poultry, for lack of personal jurisdiction.

Without the Sherman Act's nationwide service of process provision, these plaintiffs would have to rely on Oklahoma's long arm statute to establish personal jurisdiction over the defendants, and defendants claim they are not subject to personal jurisdiction in Oklahoma under the long arm statute. But because the Court has not dismissed the Sherman Act claim, I decline to find the plaintiffs are incapable of establishing personal jurisdiction on that basis.

That leaves us I think just with Perdue's motion to compel arbitration and to dismiss, or, in the alternative, to stay. I guess I should have summarized a moment ago. I think I've now addressed all the arguments in the Rule 12 motion. And for those reasons stated, that motion is denied.

So turning to the motion to compel, Docket 192, in addition to joining defendants' motion to dismiss at the joint motion, defendant Perdue Farms separately moves to

dismiss or stay pending arbitration the claims of one plaintiff, Nancy Butler.

Once again, some relevant factual background. Butler is the only named plaintiff here who is alleged to have been in a grower-integrator relationship with Perdue. On May 28, 2015, she signed a poultry producer agreement with Perdue Foods LLC, a subsidiary of named defendant Perdue. That agreement contained an arbitration clause requiring any disputes between Butler and Perdue be resolved via the complaint and arbitration procedures outlined in the agreement. I'm reading now from Docket 192-2 at Page 13.

The complaint procedures required Butler to instigate a complaint by presenting her concerns, first to a local flock advisor within three working days from the date of the problem, or three days from the date when Butler became aware of the problem, whichever occurred first. The complaint procedures, if several interim steps failed, culminated in a recommendation from a peer review committee if they involve payment or settlement issues. If either party rejected the committee's recommendation, or if the issue never went to the peer review committee in the first place, then a party is permitted to instigate arbitration.

The procedures outlined in Butler's agreement with Perdue require any party instigating arbitration to do so within 120 days after the complaint or issue arose.

Citing Docket 192-2 at Page 11, Paragraph 3. Each party bears its own cost in arbitration and they share equally the cost of paying for an arbitrator who has expertise in the poultry industry. Paragraphs 5 and 6. Discovery is permitted, but only, if at all, after the arbitrator authorizes it upon a showing of substantial need. I'm citing Paragraph 8. And the arbitrator has no power to award, and the parties are barred from seeking in any other forum, non-monetary or equitable relief, damages inconsistent with the parties' agreement, or punitive damages not measured by the prevailing parties' actual damages. Paragraph 9.

In the 2015 agreement, Butler and Perdue also waive any right to assert class action claims against one another, and they agree they will not lead, join, or serve as a member or a class bringing such a claim. Paragraph -- let's see. I think that's -- now I'm missing the cite to that. I apologize. When Butler signed the agreement in 2015, she additionally signed an opt-in provision relating specifically to the arbitration agreement agreeing that she "accepted the arbitration provisions as set forth in this agreement." Such a conspicuously disclosed opt-in provision is required for arbitrating clauses to be minimally valid and enforceable under the PSA. And I'm citing here 7 United States Code, Section 197c(a)(b).

In 2017, Butler signed a modification to the 2015 agreement. It was an updated fee schedule. Docket 205 at Page 3. She did not sign a new opt-in agreement relating to arbitration. Plaintiffs fault Perdue for not including an opt-in agreement in the 2017 fee modification.

Let me just quickly dispose here of an argument the plaintiffs advance in their papers, that Perdue was required to include a new opt-in provision along with the 2017 modification. At least on the arguments before me, I cannot reach that conclusion. Perdue persuasively points out that the 2017 modification makes clear on its face that it is simply an updated fee schedule applicable to the earlier entered 2015 agreement. And that Butler, in signing the 2017 updated schedule, agreed to be continued -- agreed to be bound by the terms -- the other terms of the 2015 agreement.

Turning to the motion, Perdue argues that, pursuant to the arbitration provision in the 2015 agreement, Butler has contracted with Perdue to arbitrate her Sherman Act and PSA claims that she now brings, and that this arbitration clause requires that I dismiss those claims. But Perdue argues that if Butler's claims are not dismissed pursuant to the arbitration clause, then all claims against Perdue in this action should be stayed pending Butler's arbitration because none of the other plaintiffs were Perdue

growers, and none have alleged they were denied the opportunity to be a Perdue grower pursuant to the overarching conspiracy alleged.

Perdue finally argues that Butler also waived certain rights relating to this litigation. They include the ability to seek treble damages, the ability to lead, join, or serve as a member of a class in a class action, and also the right to trial by jury.

Plaintiffs advance four primary arguments in opposition to Perdue's motion. This begins in Docket 201. First, plaintiffs maintain that Perdue's motion is futile. I think that they mean that it won't have meaningful impact on the litigation because Butler would still have conspiracy claims against the other defendants, and the other plaintiffs would still have such claims against Perdue. I agree.

Plaintiffs assert claims alleging anticompetitive agreements amongst all the defendants demonstrated or supported by the no-poach agreement and the illicit information sharing agreement that had the effect of lowering compensation to all growers, regardless of their specific contracting integrator. And Perdue's argument in its reply on this point I thought was quite unhelpful, pointing simply to the fact that there's a contractual relationship between distinct growers and defendants. But

of course this does not mean that the contractual relationship is necessary to pursue claims.

Second, the plaintiffs argue that Butler's Sherman Act and PSA claims are simply not covered by the arbitration agreement. Third, the plaintiffs argue the arbitration provision is unenforceable under the effective vindication doctrine. Of course, Justice Scalia articulated that doctrine in *American Express vs. Italian Colors Restaurant* and described the doctrine as a judicial willingness to invalidate on public policy grounds arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies. That case of course was a 2017 Supreme Court decision, and that language I just quoted, with a part in the middle not material or relevant omitted, is on Page 235.

Fourth, and finally in their opposition, the plaintiffs argue that the arbitration provision is unenforceable under the PSA because Perdue provided Butler with a 2017 modification to the 2015 agreement, but that the 2017 agreement failed, as I said, to provide an opt-in or opt-out arbitration provision. And as I've already indicated, I find that argument unpersuasive.

So I will now discuss whether Butler's claims are covered by that the arbitration agreement, and, if so, whether Butler, nevertheless, escapes its application

through the effective vindication doctrine.

Once again, we have to first understand the law that I'm required to apply. Perdue, as the party seeking to enforce the arbitration provision, bears the burden to show that it's applicable. I'm citing *Hancock vs. AT&T*, a Tenth Circuit decision from 2012. The PSA contemplates arbitration of PSA claims, subject to disclosure requirements. Mandatory arbitration of PSA claims is permitted if a contract conspicuously discloses that it allows a producer or grower, prior to entering the contract, to decline to be bound by the arbitration provision. That's the provision of 7 United States Code, Section 197c(a)(b) that we previously mentioned. And the Federal Arbitration Act provides that a written provision in any contract to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable and enforceable save upon such grounds that exist at law or in equity for the revocation of any contract. That language from 9 United States Code, Section 2.

The Supreme Court commenting on this language has explained that it reflects a liberal federal policy favoring arbitration. And that was explained further in the *Conception* case from 2011. And in *Italian Colors*, the Supreme Court said the overarching principle is that

arbitration is a matter of contract. And more recently, the Tenth Circuit in *Jacks vs. CMH Homes* explained that arbitration is a matter of contract. And in order to determine whether a party has agreed to arbitrate a dispute, courts in this circuit are instructed to apply ordinary state law principles that govern the formation of contracts.

I'm instructed that a party cannot be required to submit to arbitration any dispute which he or she has not agreed to submit to arbitration. And while doubts concerning the scope of arbitrable issues are resolved in favor of arbitration, the presumption of arbitrability falls away when parties dispute the existence of a valid and enforceable arbitration agreement in the first instance. All of that is language from that Tenth Circuit decision, *Jacks*.

I'll first take up whether Perdue has shown that Butler's Sherman Act and PSA claims are covered by the 2015 arbitration agreement.

While antitrust and PSA claims are not categorically shielded from arbitration, an issue clearly answered in the PSA itself and *Italian Colors* and other cases, that does not mean that they are necessarily covered by this agreement. Here, the broad arbitration agreement found at Section VII(B) does appear to cover the claims asserted by Butler in this case. That provision provides

that "all complaints and disputes by and between" Butler and Perdue, irrespective of whether those complaints or disputes relate to the 2015 agreement, shall be resolved by Perdue's complaint resolution procedure and/or arbitration, as the case may be. While it seems strange to require a grower like Butler to take antitrust claims to a flock advisor, plaintiffs haven't persuasively argued why this oddity requires the Court to ignore the plain language of the agreement. And once a grower goes through the admittedly odd complaint procedure, they are then able to instigate arbitration. And this broad provision requires more claims than other parts of the 2015 agreement's complaint and arbitration procedures. For instance, in another part, Section VI more narrowly states that the complaint resolution and arbitration procedures apply to complaints or disputes arising from the agreement. That was -- that's explained at Page 9 of 192-2.

But plaintiffs complain that, even if the claims are covered, that I should decline to enforce the provision because the effective vindication doctrine requires that result.

As I've said, the Supreme Court explained in *Italian Colors* that, under the effective vindication doctrine, a court may invalidate on public policy grounds arbitration agreements requiring a signatory to

prospectively waive their right to pursue statutory remedies. That discussion at Page 235 of the decision quoting, in part, the *Mitsubishi Motors Corp.* case from 1985. In addition to invalidating a provision in an arbitration forbidding the assertion of certain statutory rights, the doctrine might also invalidate, or be available invalidate provisions imposing fees attached to arbitration that are so high as to make access to the forum impracticable. But the expense involved in proving a statutory remedy is not the same as eliminating the right to pursue that remedy. And the fact that an arbitration agreement increases some costs will not necessarily invalidate the arbitration agreement.

Under these principles, the *Italian Colors* court upheld an arbitration agreement that the Sherman Act class action plaintiffs were seeking to avoid, which required them to arbitrate their claims individually rather than on a class basis.

Plaintiffs argue that multiple provisions in Butler's agreement run afoul of the effective vindication doctrine. And before I discuss them, let me first note that I am unpersuaded by Perdue's initial response to the plaintiffs' argument on this issue. That is that the plaintiffs have, as a threshold matter, ignored the fact that Butler voluntarily entered into the arbitration

agreement, indeed opted into it, and that she cannot now express what Perdue terms buyer's remorse. That argument is in Docket 205 at Page 7.

That argument was soundly rejected by the Tenth Circuit in *Nesbitt vs. FCNH*, a 2016 decision. Indeed, plaintiffs made this point in their briefing at Footnote 9. In *Nesbitt*, the court explained that the fact that the arbitration agreement the plaintiff had entered into contained an opt-out provision could not preclude the doctrine's application, because in the cases the doctrine is applied, the courts must necessarily have found that binding arbitration agreement under which the parties agreed to submit claims to arbitration. The opt-out option, or, in this case, the opt-in provision is irrelevant once the parties have the agreement in place. And that discussion was on Page 378 of that Tenth Circuit decision.

Further, at least in my judgment, Perdue's attempt to distinguish *Nesbitt* appears wholly unavailing when Perdue argues that, because their opt-in complied with the PSA regulations to create a valid arbitration clause, the agreement should somehow escape evaluation under the effective vindication doctrine. That argument is on Page 6. Every agreement evaluated under effective arbitration is, initially, procedurally enforceable or else we wouldn't reach the doctrine. And the PSA, just as a matter of

statute, puts in place extra protections to make sure those agreements don't improperly bind growers. But once there is a binding agreement, and that's just the first step, the next step necessarily follows. And that's the question here. Does it impermissibly trample certain statutory rights? Not every binding agreement does.

Turning to plaintiffs' specific arguments for application of the effective vindication doctrine, I have differing views on the six issues the plaintiffs identify, which I have generally placed into four categories and will take up in ascending order of my concern. And in the end, I conclude the doctrine applies to permit Butler to escape application of the arbitration agreement.

First, discovery. Discovery is available under the agreement only upon showing substantial need. This does not clearly trigger the application of the doctrine. It sets forth a slightly different standard, the arbitration clause does, but does not preclude discovery, nor does it clearly hinder vindication of any rights. Speculating that somehow, some day Butler might not get the discovery she sought or needed or could not use discovery gained in this case is not enough in my judgment.

Second, requiring Butler to pay arbitration fees. There are plenty of cases suggesting that fees might trigger application of the doctrine if a plaintiff meets an

initial burden to show that they would be somehow cost-prohibitive. And here *Nesbitt*, I think, is illuminating. In *Nesbitt*, the plaintiff had submitted evidence of the likely cost of arbitration, and evidence demonstrating why it would be prohibitive. The problem here, of course, is that we don't have any such evidence. So while it might have been an avenue to trigger application of the doctrine, the plaintiffs' showing here, at least in my judgment, is insufficient.

Third, we have the question of the statute of limitations. Under the arbitration agreement, a plaintiff is required to assert a claim within 120 days as opposed to four years, which is the statute under the Sherman Act, or that a claimant would normally have under the PSA. The Fourth Circuit court of appeals in *Cotton Yarn* allowed a one-year statute of limitations to apply in an arbitrable Sherman Act claim. And in so doing, that court noted the statutes of limitations may be shortened by agreement, unless they are unreasonably short. And of course that decision, the *Cotton Yarn* case is a 2007 decision.

I find that 120 days is an unreasonably short time frame within which to require a prospective plaintiff to assert a Sherman Act claim, or the type of PSA claim asserted here. And that determination hinges on the nature of the claims, complex antitrust claims, one that defendants

here rightfully point out in their joint motion to dismiss demands highly detailed factual allegations and complex legal justification.

Fourth, of most concern to me in view of the case law, is the fact that the remedy -- there is the nature of the remedies barred under the arbitration agreement. This agreement eliminates the right to recover attorneys' fees and treble damages, which the *Italian Colors* court specifically recognized in dicta as important to vindicating Sherman Act rights. It also prevents recovery of any injunctive relief. And in my view, these present insurmountable problems for Perdue in this case.

And Perdue's response to these concerns about the barred remedies in its reply falls far short in my judgment. Though Perdue offers at least some discussion in its reply concerning costs, discovery, and the statute of limitations, there really is no direct engagement on the issue of barred remedies. At best, Perdue cites the *Cotton Yarn* case and argues the Fourth Circuit there rejected the plaintiff's urged application of the effective vindication doctrine. And I quote Perdue's description, "Even where the arbitration provisions limited the statute of limitations period, the scope of discovery, and plaintiffs' potential damages recovery under the Clayton Act." That was Page 9 of Perdue's brief. But in that case, I could not find an

explicit reference to any contract term limiting damages. At most, in that case, the plaintiff had argued that a shorter statute of limitations might have a practical effect of reducing the amount of damages they could recover because, they contended there, that the period of harm would be reduced.

But the court of appeals rejected that argument, noting it amounts to little more than an operation that the limitations period under the arbitration agreements is shorter, and the unremarkable recognition that limitations provisions affect the amount of damages that may be recovered. The discussion was at Page 288 of the decision. There is no arbitration provision I could find discussed in *Cotton Yarn* that expressly affected the remedies the plaintiff could seek as the Perdue arbitration agreement does in multiple ways. Thus, Perdue has essentially not addressed this argument in its reply.

The Court concludes the arbitration agreement's limitation of the statute of limitations for complex antitrust claims and the barring of remedies otherwise available to Butler, and critical to vindicating rights under the applicable federal statute, warrants application of the effective vindication doctrine under which I conclude Butler is not bound by the arbitration agreement with regards to the claims she seeks to pursue in

this case.

And I'll note that, at oral argument, Perdue offered some allusion to possibly severing certain clauses from the arbitration agreement in order to save it. But Perdue had offered not a word in response to plaintiff's contention in their opposition that the problematic provisions could not effectively be severed. Perdue waived its response in argument, in the Court's view, and otherwise inadequately briefed it, and I will not undertake a rewriting of the arbitration provision.

As a final matter, Perdue argues, pursuant to another provision in the 2015 agreement, that Butler has waived certain rights related to class actions. And I decline at this time to evaluate and apply that provision so far in advance of the class certification stage. And to the extent that Perdue argues here that Butler -- that without Butler as a class plaintiff, claims against Perdue cannot continue, I disagree given the nature of the allegations in this antitrust case. The other plaintiffs allege Perdue conspired to violate antitrust laws, and that they were harmed as a result. There is no reason, at least in face of the argument and briefing submitted by Perdue at this point, why those claims cannot proceed. Of course, we may have to take up the class issues later.

I greatly appreciate your patience as we got

through all of that. The effect of that is to deny Perdue's motion to compel arbitration.

And that naturally leaves me wondering where we are and where we're headed. The plaintiffs -- Mr. Cramer, the plaintiffs still maintain that some modification to the allegations in the consolidated complaint are necessary to bring it in compliance with the bankruptcy court's order?

MR. CRAMER: Your Honor, we believe that's true, some minor modifications. Mr. Smith is going to handle it, so I will have him --

MR. SMITH: It will be brief, Your Honor.

THE COURT: Would you kindly come to the podium to aid the court reporter? Thank you.

MR. SMITH: Yes, Your Honor. We think the bankruptcy issue is relatively easy to resolve. Our amendment would clarify three things. It would clarify that we are not seeking any damages flowing from conduct that predated Pilgrim's bankruptcy discharge.

THE COURT: Against Pilgrim or any defendant?

MR. SMITH: Against Pilgrim. Pilgrim is the only one entitled to the benefit of the discharge. We are going to then clarify -- this is in our complaint, but we will just emphasize that we are only seeking damages from 2013 onwards. And of course the bankruptcy discharge was several

years before that. And that, finally, we will clarify that Pilgrim committed overt acts in furtherance of the conspiracy after the date of its discharge, which brings it back into the fold for liability purposes for the conspiracy.

We would propose that we would bring a motion to amend before Your Honor on a timetable to be discussed among the parties and Your Honor, and then Your Honor could rule upon that motion to amend.

THE COURT: Do you know today as you're here, speaking on behalf of the plaintiffs collectively, whether the plaintiffs are contemplating any additional modifications to the complaint beyond those you've just outlined?

MR. SMITH: Yes, Your Honor. There is one sort of clerical issue. At the outset of the case, Perdue had told us that we had named the incorrect legal entity, and we had reserved the amendment to bring in the correct legal entity so as not to disrupt the briefing schedule. And so we would make that sort of clerical amendment in the complaint. But other than that, I don't see any other amendment that would be necessary.

THE COURT: Okay. Thank you. Defendants, let me just say in response to what I just heard, what makes the most sense to me I think is to construe that as an oral

motion to make those modifications to the complaint, and I don't think they are substantive with respect to any of the legal issues that have been addressed, and I'm inclined to grant that motion today so we can get the complaint on file and get moving. But let's hear from all of you, or those of you who care to be heard. Mr. Bailey.

MR. BAILEY: Good afternoon, Your Honor.

THE COURT: Hi. Welcome.

MR. BAILEY: Well, I appreciate what the plaintiffs are saying about seeking leave, but we need some specifics as to when these overt acts that my client engaged in occurred. We heard that they may be seeking damages from 2013 forward, but when are the acts and what were the acts? We need to see that amended complaint before we should go forward.

THE COURT: Before I --

MR. BAILEY: I think there needs to be some more meat on that bone.

THE COURT: But before I decide whether we should receive it? We're just talking procedure right now. Like whether we should require the filing of a motion seeking leave to amend the complaint, attaching a copy of the amended complaint and inviting a brief, doesn't that just add one additional step to getting to the core issue? Your concern may be present, which is --

MR. BAILEY: We've got a bankruptcy issue here, Your Honor, and I need to see what the complaint is, because what they're alleging may not satisfy what the bankruptcy court has ordered them to do. We have an injunction in place. I would just say this: The bankruptcy court ruling was in March of 2018. The plaintiffs know what the issues are. I would think if they had -- I don't know, I'd leave it up to them -- 15, 30 days, if even that long, to file a formal motion for leave with the amended complaint attached, and give -- you know, Pilgrims will agree to a ten-day time frame to respond. That should be plenty enough.

THE COURT: That's seems --

MR. BAILEY: Does that seem fair to the Court?

THE COURT: Thanks for asking. It does. I mean, I don't want to receive a complaint that runs afoul of the injunction in the bankruptcy case. And, Mr. Smith, I hear from you? Sure. But I think I understand your position, Mr. Bailey, on behalf of Pilgrims Pride. Thank you.

MR. BAILEY: Thank you, Your Honor.

THE COURT: Mr. Smith.

MR. SMITH: Yes. Just to clarify what the bankruptcy court injunction said, was it said that we cannot proceed against Pilgrims until we have amended the complaint. That's what we're trying to do. That's what your order or granting the oral motion would accomplish.

There's no bar to us proceeding in that way if that's how Your Honor would like to proceed.

THE COURT: I appreciate that. My --

MR. SMITH: And as to overt acts, Pilgrims, every day from 2013 -- every week from 2013 to the present, committed an overt act by exchanging information with its co-conspirators. So we don't think the overt act issue is particularly hard to flesh out in this case.

THE COURT: I think I understood Mr. Bailey to -- he didn't say this, but I think I understood him to raise two different concerns. One is one related to the substance of the allegations, and the other, allegations that may implicate the injunction. And it's the latter, not the former that has me most concerned about the procedure that we're going to employ. I don't think it will be unreasonable to require you to submit a motion with an attached proposed second amended consolidated complaint I suppose. When would you -- when would you contemplate doing that?

MR. SMITH: We could have that on file in four weeks if that would please the Court.

THE COURT: It's your --

MR. SMITH: Or three weeks.

THE COURT: It's your -- you tell me. It's your complaint. Three weeks -- three weeks from today? I don't

have a calendar.

MR. CRAMER: January 27th.

MR. SMITH: January 27th, Your Honor.

THE COURT: Thank you. January 27th. We'll look for a motion for leave to amend on or before January 27th. And a response, if any, from Pilgrims Pride within three weeks of that date, Mr. Bailey?

MR. BAILEY: That will be fine, Your Honor. Thank you.

THE COURT: Thank you. I think that's February 17th. All right.

MR. CRAMER: February 17th is President's Day just in case --

THE COURT: Well, we'll honor our presidents. No, we'll -- thank you. The 18th. February 18th for -- on or before February 18th.

Plaintiffs, you have told us today -- well, this is going to be crucial I think. The answers need to be drawn to the operative complaint, and it won't make any sense to anybody to respond to this complaint because it's going to change. So we will stay the time for answering the complaint until after the Court decides the motion for leave to amend. And that ruling will include -- well, if there's going to be -- if the Court is going to be ordering answers from parties, I'll include a time line for that in the

ruling that we provide on the order deciding the motion for leave to amend. I think that's the best way to go forward.

And then the next thought that I have, we have -- I stayed -- at the defendants' request, I stayed discovery in this case at the outset, in contravention of my own practices and I think the practices that are the preferred practices in the Tenth Circuit generally. And it seems to me that it's time now to begin discovery. But let's -- I assume the plaintiffs wish to proceed with discovery.

MR. CRAMER: Yes, Your Honor, we do.

THE COURT: So let's hear from the defendants. Thank you. Ms. Adcox.

MS. ADCOX: Thank you, Your Honor. And we do appreciate your inclination to move this case forward in a relatively expedient manner going forth. We think the quickest way to do that is, as Your Honor suggests, to get a new consolidated amended complaint on file. To allow the parties to look at that. To allow the parties, including Perdue and Tyson, to respond to that complaint, if such a response is necessary. Obviously we don't know exactly what amendments the plaintiffs will make until we actually see the complaint.

The concern that we have, and the reason that we believe the stay should remain in place, until the

complaint is resolved upon and any motions to dismiss are decided is that we are greatly burdened by piecemeal discovery. We know, for example, that the plaintiffs will want to bring Pilgrims back if Tyson and Perdue, for example, are off and running in discovery negotiations. Any sort of a late entry by Pilgrims can cause quite a bit of inefficiency and confusion. Pilgrims will want their opportunity to challenge the new allegations in the complaint, if that's appropriate, and will end up having to play catch-up or otherwise stall the rest of discovery in the case. Pilgrims, in the meantime, would also be unable to weigh in on any procedural issues that need to get discussed in the interim, which will prejudice them, and I'm sure Mr. Bailey can address that if he feels the need.

Piecemeal discovery in this case would also be burdensome and costly because of the geographic scope of the case that Your Honor has now ruled upon. Documents and personnel are likely to not be centrally located. There are grower complexes all over the United States. There are also issues with the fact that search parameters that plaintiffs will most likely want to start negotiating will be affected by any sort of disparity or later addition of claims or facts, and particularly with respect to the use of technology-assisted review which requires some certain scope of the case.

THE COURT: I'm sorry, I want to make sure I understood the last thing you said.

MS. ADCOX: Sure.

THE COURT: I think what you were suggesting was that our uncertainty about what claims might be asserted in the complaint and be answered by the defendants creates a specific burden in here because of the ESI inquiries that will have to be -- those will be tailored to the claims. And until we know the claims, we can't know the inquiries, and let's just do it once and not twice. Is that what you were saying?

MS. ADCOX: That's effectively what I'm saying. And, Your Honor, I think that, in this case particularly, if plaintiffs are true to their word --

THE COURT: I can't tell for sure, but it looks like our court reporter might be having trouble, A, hearing you, and, B, you might be speaking really quickly.

MS. ADCOX: Thank you, Your Honor. I will correct both. I also think, Your Honor, that if plaintiffs are true to their word here, and that the scope of their amendments will be somewhat limited, the effect of the stay will not prejudice them. All it will do is serve to move the case forward in the most efficient manner by making sure that all of the parties are on the same page.

THE COURT: Okay. Rather than just rule against

you, I want to credit your argument and make sure I'm giving it full weight. I am certain -- I'm nearly certain that discovery, as you said, will be complicated and expensive in this case. Courts ordinarily proceed in cases without waiting for resolving motions to dismiss and narrowing claims and whatever else happens. Moreover, that discovery is going to happen in this case. I've now overruled the substantive objections to the Sherman Act claim and PSA claim. And Pilgrims may raise specific objections about the sufficiency of certain allegations as to Pilgrims. They may raise issues relating to the scope of the new allegations vis-a-vis the bankruptcy injunction order. I don't understand that anything Pilgrims is going to say -- and I accept the plaintiffs' representations today about the nature and scope of the proposed amendments. Nothing Pilgrims is going to say is going to prevent that discovery from going forward. Isn't it just time to start, in fairness to the plaintiffs who have been waiting two years, to just begin, to have a Rule 26(f) conference and serve some discovery?

MS. ADCOX: Well, I appreciate, again, Your Honor's view on this. I think our concern simply is with the piecemeal nature of the discovery that might result if we have Pilgrims on one track and the two defendants on the other track. And so anything we can do to avoid that, Your

Honor, would obviously be appreciated.

THE COURT: So there's no reason, is there, that Pilgrims couldn't participate in a Rule 26(f) conference like defendants do all the time in cases where they're named but haven't yet answered? Do you want to --

MS. ADCOX: I would like -- no, I'd like to defer to Pilgrim's counsel for obviously his opinion.

THE COURT: Sure. Do you see any reason why they couldn't participate? Would you object to their participating in a Rule 26(f) conference?

MS. ADCOX: We would not object. But, again, I cannot speak for Pilgrims as to whether they would object with no operative complaint on file.

THE COURT: Okay. Thank you. Before we hear from Pilgrims, Mr. Smith or Mr. Cramer, do you object to Pilgrims participating in an attorney planning conference before --

MR. CRAMER: We do not object.

THE COURT: -- they answer it or move to dismiss your complaint?

MR. CRAMER: No, we do not object, Your Honor. And the discovery can proceed before -- there's going to -- it's going to take time to negotiate a Rule 26(f) report to Your Honor. That can proceed. By the time we have a Rule 16 conference, I think the operative complaint will be clear and the allegations will be clear. There's nothing

mysterious. And we think it's time to begin moving forward. There are a number of documents that these parties have already produced to the Department of Justice relating to some of these underlying claims in the consumer case related to these underlying claims. We have to negotiate a confidentiality agreement. There's going to be -- we have to negotiate search terms, and those are going to be similar whether Pilgrims is there or not. We -- there are a lot of preliminary things that can and should be accomplished over the next few weeks, and that can happen while we're working on the very minor amendments to the complaint.

THE COURT: The plaintiffs -- let me -- Mr. Smith I think answered this question, but let me just ask directly and to the point. The plaintiffs have no intention of articulating a new theory of the case as to Pilgrims?

MR. CRAMER: We do not.

THE COURT: No new claims as to Pilgrims?

MR. CRAMER: We do not.

THE COURT: Your intent in the further amendment is to narrow the scope of the claims that are already asserted against Pilgrims. Is that true?

MR. CRAMER: Correct, Your Honor.

THE COURT: Thank you. Mr. Bailey.

MR. BAILEY: Your Honor, Pilgrims doesn't have a problem discussing or having a conference about scheduling,

or even a protective order in this case. I think the only problem I have, again, is if we get into some type of ESI protocol or who my custodians are going to be, that type of thing. Until I see the complaint that's alleged, what date is it going to be that we supposedly, you know, entered into this conspiracy after December 20, 2000 -- I hear 2013. Just when is it? That does have an impact. People come and go in corporations. If they say it started June 1 of 2013, that may impact the custodians who left before then on the live production side.

So that's the issue I have, is it really causes me to speculate in trying to negotiate things. As it relates to dates and things like that for scheduling, we can engage in those discussions.

THE COURT: I appreciate that, Mr. Bailey. We're talking about the proposed second amended class action complaint being on file on or before January 27th. And you strike me as a really bright lawyer. And while I'm confident that you may be partially handicapped in your ability to provide some information prior to the 27th, I'm sure that -- I'm sure we can work our way around it.

It's time to begin. I'm going to lift -- I'm ordering lifted the stay on discovery that I previously imposed in the case. And I don't know that it will be helpful for me to start doing anything more with respect to

discovery now. You all begin. It's time to have a Rule 16 conference, I think a Rule 26(f) conference.

I'm just now thinking about -- now I'm wandering into space where I think I'd like your feedback about something. I've said now at least twice and probably three times -- I'm sorry if I'm being repetitive -- I think you would all benefit from an A referral to a magistrate judge in this district for the non-dispositive matters, specifically for two reasons. One is that the plaintiffs chose this forum. And one of the calculations in choosing a forum I think, and appropriate consideration, are the rules that will govern the proceedings. And I think you're entitled to the application of the local rules. And that would be more efficiently done by a magistrate judge who implements those rules on a day-to-day basis consistent with the standing custom and practice. That may also have been an appropriate consideration by the plaintiffs choosing this forum. Second, and while I can -- we'll talk a little bit more about case management and the District Court's involvement. Having a local magistrate judge will make it much, much easier to have hearings if they are necessary on any of the case management issues that the magistrate judge will oversee, at least in the first instance. So I propose to enter an A referral and have one of the local magistrate judges assigned for that reason. But I'm open to some

discussion about that if anybody cares to weigh in.

Mr. Cramer.

MR. CRAMER: Your Honor, we think that is a good idea as long as the magistrate judge is limited to discovery-related matters. We would like Your Honor, obviously, to consider the summary judgment motion, the class certification motion, and the entire scheduling of the case. We think Your Honor should consider the case as a whole and how that's going to proceed, and then allow the magistrate judge to deal with the discovery disputes as they arise. Because the case -- the case schedule, that is how we're -- how long discovery is going to last, when summary judgment will be briefed, how class certification is going to happen, when the expert reports will be due, whether they'll be -- class and merits reports will be separate or whether they'll be combined, there will be a number of issues that will, I think, given that Your Honor will be considering the class motion and the summary judgment motion and, ultimately, as we head towards trial, we think that it would be best if Your Honor considered the overarching schedule, and then allow the magistrate to work within that schedule.

THE COURT: Okay. Defendants. Ms. Adcox.

MS. ADCOX: Thank you, Your Honor. We do not have any issue with the appointment of the magistrate judge. But

we do think it sufficient if the magistrate judge does make scheduling rulings in consultation with Your Honor as opposed to Your Honor being somebody that we're back to when and if schedule changes are necessary midstream in the case.

THE COURT: Okay. Well, I'm going to think about that and consider that. Look, this is not a routine case, at least not in my judgment. And I anticipate, given the complexity of the issues, the nature of the issues, the nature of the claims, the number of the parties, the sophistication of counsel and the like, and also whatever -- whatever months of delay I'm accountable for in this case. I'm going to be actively involved in the management of the case, more so than I ordinarily am in a case has an A referral. And my instinct is, but I'm going to think more about what you've all said -- and I wonder, when I say an A referral, you all -- yes. Okay. Under the Magistrate Act, right? So non-dispositive motions subject to an appeal, or objections and things of that nature. Ordinarily that is all non-dispositive motions.

But that is not what I had in mind in this case. Mr. Cramer, you brought up the class motions. I'll decide the class certification issues in the case. And I do think that this is an appropriate case for active involvement in the scheduling, at least in the first

instance. But I think the practice I'll employ is we'll actively manage -- monitor the docket and if there -- we'll be active in regular communication with the assigned magistrate judge. And I may unrefer specific motions that get filed so that we can address them directly. And I'll just -- I don't -- we'll do it on a case-by-case basis I think.

Related to that point, though, now I'm just asking you how I can help best serve all of you. I've had cases where it's been helpful to have monthly status calls. I've had cases in MDL that we manage where I require the parties to submit 60-day reports and raise issues that the parties are having trouble resolving so that I can be involved. I'm just trying to think about the most effective way for me to help all of you get answers to the questions you're going to need answered. Maybe it's just through the traditional motion practice. I don't want to impose additional time and expense on the parties by requiring you to come here for hearings quarterly or more often just to have a hearing. So I don't know. I think what might be most helpful is to receive periodic reports from counsel concerning the issues that you're working on, the success you're finding, and those issues that are arising where you need the Court's involvement. And it could be done in an informal way through this, it could be a joint submission by

the parties on whatever schedule we agree to. And insofar as you agree about things in the joint submission, that would be set out. And insofar as anybody wanted to say something else that others didn't agree with, you can include that. We could review those reports, and then we could either have calls or meetings as necessary to address whatever issues have arisen. I'm sort of thinking out loud while I'm talking now, but I'm finding that I like my idea, which is not surprising maybe. But let me ask for your thoughts about that.

MR. CRAMER: Your Honor, Eric Cramer for the plaintiffs. Yeah, we agree. We think that periodic joint submissions with the opportunity for each party, if there is disagreement, to weigh in on what their disagreement is and their respective positions are would be a good idea. So I think that is a good idea. And then, as result of those regular joint submissions, there may be a point at which enough disputes have arisen where a hearing, telephonic or in person is necessary. So we think that's a good idea.

THE COURT: Defendants, I don't know if you have a response you care to share.

MS. ADCOX: Your Honor, I think we would need to take care to make sure that the regular submission of these reports doesn't actually precipitate disputes rather than resolve them, and that may be solved by having them on a

less frequent basis perhaps.

MR. CRAMER: Your Honor, in my experience, the practice of doing a joint report to a court often helps resolve disputes because parties have an interest in not being obstreperous and showing that they're trying to work things out in a reasonable fashion. But that's just been my experience. Others might have a different experience with that.

THE COURT: We're going to -- I do need to take a very short recess for a moment. I think we'll be like five minutes. But why don't we take a very short break and come back and continue this discussion. It will be less than ten minutes. Thank you.

(Off the record at 12:37 p.m.)

(Back on the record at 12:50 p.m.)

THE COURT: My apologies for that interruption. I'm informed that I misspoke in announcing the conclusion of our ruling on the earlier motions, though all of you knew what I meant, which is why you weren't alarmed. I think I said -- I must have said that the plaintiffs' joint motion to dismiss was denied. And of course it was the defendants' joint motion.

All right. Well, I think -- I appreciated hearing from -- though I guess we didn't hear from all the defendants. I think Ms. Adcox had a moment and was

consulting with her colleagues before she spoke about status reports. I think that makes sense to me is a good way for us to begin this case. It's worked for us in MDL proceedings. And when I was a lawyer in class action litigation, I thought it was helpful to avoiding disputes percolating to the motion stage and requiring more -- required fewer motions I think than not requiring that process. I do know they can be burdensome, though, and time consuming, and so I don't want it to overwhelm what you actually need to do.

I'm going to propose, at least initially, that we start with 90-day status reports and let's go from there and see how it works. And I'll read whatever you submit, and so make them as brief or as lengthy as you need. You can take advantage of those reports as an opportunity to inform me and educate me about things. It won't be super helpful to you to be arguing the merits of a lot or pre-arguing the merits of things. We'll get to those. But let's just get a sense for it, a measure of it. The first, if we start on a 90-day schedule, this is the beginning of January, about a 90-day report -- actually, let's do this.

I'm going to propose -- and we'll talk in a moment about whether this makes sense to any of you. I'm going to propose that we hold a date for a potential hearing, if we need one, in early April before Easter. And

so maybe your first report, it would be helpful if it came a week earlier. Let's just think about the first report being due on -- submitted by March 30th. And I don't know, I hope it's not horribly burdensome for all of you for us to have Monday hearings. It's just a good day for me to do it. It requires you to travel on Sunday. I don't know that we need to meet in person in early April to decide any issues to fix the pleadings finally. But I'm going to propose that we hold Monday, April 6th as a hearing date, if we need it, to get together and resolve any outstanding motions. April 5th I think is Palm Sunday, but we're far enough out from Easter I hope it wouldn't interfere with any of your schedules. Can you be available -- Mr. Cramer, can the plaintiffs be available on the 6th?

MR. CRAMER: Yes, we can, Your Honor.

THE COURT: And are there defendants who are unable to be present on the 6th?

MS. ADCOX: No, Your Honor.

THE COURT: Okay. I don't know that we'll have that hearing or we won't. Let's see what unfolds in the briefing in the next little bit. I picked that time period just sort of working backwards from what I think the briefing schedules may be on the motions, and so we'll have your report the week before. And if it becomes clear that we don't need to have a hearing, I'll vacate that hearing as

early as I can so you can -- you don't -- so you have control over your schedules.

What else should we take up while we're here, if anything, from the defendants' perspective?

MS. ADCOX: No, Your Honor.

THE COURT: From the plaintiffs?

MR. CRAMER: Your Honor, think it would be helpful for you to schedule a date for the Rule 16 conference because that date -- from that date flows the 26(f) report and the other things the parties need to do. And that could be either by telephone or in person. But we suggest at some point in the first two weeks of March would be a good day for a Rule 16 conference.

THE COURT: I wonder if -- so the practice in our court in Utah, the Rule 16 conferences are handled by the magistrate judges, though I am happy to handle -- I think it would be helpful for me to be involved in the Rule 16 conference here. Why don't we plan to do that on April 6th, and any motions we'll need to take up. And that may be a few weeks later than you had in mind. But maybe we'll also then have the benefit of your report on the 30th. So we'll set that date as a Rule 16 conference and a motion hearing. That's a good suggestion. Thank you.

(Pause)

THE COURT: Given that we are going to have a

90-day status report on or before March 30th, let me ask counsel if any of you think it would be helpful -- I'll defer to you -- to have a status report on the Rule 16 conference separate and apart from that 90-day conference? That doesn't necessarily make any sense to me, and I don't want to create work for everybody. Surely a week before is enough. It's ordinarily submitted two weeks before a Rule 16 conference in this district, but I think a week is sufficient unless you have concerns.

MR. CRAMER: That's fine with us, Your Honor.

MS. ADCOX: No concern, Your Honor.

THE COURT: Terrific. Mr. Cramer, anything more from the plaintiffs?

MR. CRAMER: No, Your Honor. Thank you.

THE COURT: All right. I appreciate your patience today, counsel. Thank you. We'll be in recess. I look forward to seeing you soon.

(Off the record at 12:57 p.m.)

C E R T I F I C A T E

I, Ken Sidwell, Certified Shorthand Reporter for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in the above-captioned case.

I further certify that I am not employed by nor related to any party to this action, and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 8th day of January, 2020.

s/Ken Sidwell
Ken Sidwell, CSR-RPR
United States Court Reporter